

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-219763 **DATE:** October 18, 1985
MATTER OF: Harris System International, Inc.

DIGEST:

1. Protest that requirement for performance and payment bonds in a custodial services contract unduly restricts competition is without merit since the awardee will use and clean, a considerable amount of government property in 122 buildings at two government installations and the services are essential to operation of the installations.
2. Bid bond requirement is valid where a performance bond is required and the services covered are essential to operation of an installation.

Harris System International, Inc. protests the bonding requirements of invitation for bids (IFB) No. F02604-85-B0059, a small business set-aside. The Department of the Air Force issued the IFB for custodial services at Luke Air Force Base and Gila Bend Gunnery Range, both in Arizona. Harris contends that the requirements for bid, performance, and payment bonds are unduly restrictive of competition and a burden on small and minority businesses.

We deny the protest.

The solicitation was issued on June 20, 1985. It required each bidder to submit a bid bond in an amount of 20 percent of the bid price. The IFB also required the low bidder to provide a performance bond in an amount equal to 100 percent of the contract price and a payment bond equal to 50 percent of the contract price. Harris protested these requirements to the Air Force and, following denial of that protest, filed a protest with our Office.

The Air Force contends that the bonding requirements are in the best interest of the government because:
(1) the solicitation provides for the contractor to have

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the use of government material, property, and facilities, and (2) the critical nature of the work involved requires a contractor with the technical and financial ability to complete the requirement successfully. The agency states that the awardee will be responsible for providing services in 122 buildings and that an interruption of performance would be unacceptable, since the installations are capable of meeting their own custodial requirements for only a limited time period. The agency has experienced numerous complaints and demands concerning the failure of certain service contractors at Luke Air Force Base to pay their employees. In some cases, these complaints led to requests by the Department of Labor to suspend all contract payments and to assessments of liquidated damages in connection with violations of federal labor statutes. The agency contends that such suspensions can endanger continued performance by the contractor and warrant the requirement for bonding in this case.

Harris maintains that the technical and financial ability of a bidder can be determined in a preaward survey and that the solicitation sufficiently protects government property by requiring the successful contractor to obtain liability insurance. Further, the protester argues that the bonding requirements are an abuse of discretion because the agency's justifications for the bonds are not specifically enumerated in the applicable procurement regulation.

Although a bonding requirement may in some cases restrict competition, in appropriate circumstances it can be necessary to secure fulfillment of a contractor's obligations to the government under the contract. Galaxy Custodial Services, Inc., et al., B-215738 et al., June 10, 1985, 64 Comp. Gen. _____, 85-1 CPD ¶ 658. Performance and payment bonds are generally required by statute for construction contracts. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.102-1 (1984). Under the FAR, a performance bond may be required for nonconstruction contracts when necessary to protect the government's interest. FAR, 48 C.F.R. § 28.103-2. A payment bond is required only when a performance bond is required and it is in the government's interest. The FAR authorizes the use of a bid bond where performance and payment bonds are found necessary. See FAR, 48 C.F.R. § 28.101-1; J.E.D. Service Co., B-218228, May 30, 1985, 85-1 CPD ¶ 615.

We will not question a contracting officer's determination that bonding requirements are needed in a nonconstruction procurement if the requirements are reasonable and imposed in good faith. Renaissance Exchange Inc., B-216049, Nov. 14, 1984, 84-2 CPD ¶ 534. The protester bears the burden of establishing that the determination is unreasonable or in bad faith. Galaxy Custodial Services, Inc., B-215738, supra.

As noted above, this contract involves the use and cleaning of a considerable amount of government property in 122 government buildings at two installations. Use of government property is one of the justifications specifically enumerated in the FAR for a performance bond requirement. 48 C.F.R. § 28.103-2. Requirements for performance and payment bonds are a reasonable means of securing the fulfillment of a contractor's obligations where the contract requires the contractor's use of substantial government property and the contractor's services are essential to the operation of the installation. See, e.g., Executive-Suite Services, Inc., B-212416, May 29, 1984, 84-1 CPD ¶ 577; K.H. Services, B-212172, Sept. 15, 1983, 83-2 CPD ¶ 329. These circumstances are present here. Also, the essential nature of the services to the operation of the two installations provides an adequate justification for requiring a bid bond, which the procurement regulation expressly authorizes where performance and payment bonds are necessary. Executive-Suite Services, Inc., B-212416, supra.

Additionally, we do not agree that a preaward survey or the insurance terms of the solicitation make the bonding requirements unnecessary. A preaward survey is an evaluation of a prospective contractor's capability to perform a proposed contract; it does not offer an agency any legal protection after the award is made. The requirement for insurance is not designed to protect the government against the same contingencies as performance and payment bonds; insurance covers accidental losses and expenses that are incidental to performance, but not the failure of a contractor to perform the services themselves. Performance and payment bonds, which in effect secure the contractor's obligation to perform the contract and assure payment as required by law to all persons supplying labor and material under the contract, protect the government's interest against substantial failures in performance. Id.

Finally, while bids have not been opened in this procurement, in the previous procurement of custodial services for Luke Air Force Base, with a similar bonding requirement and a small business set-aside, 18 bids were received. This strongly indicates that the requirement for bonds is not unduly restrictive of competition among small businesses.

The protest is denied.

for Seymour Efron
Harry R. Van Cleve
General Counsel